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JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF
11 SPOKANE a/k/a THE CATHOLIC
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

14 Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF
17 SPOKANE, et al.,

Defendants.

ST. JOSEPH - OTIS ORCHARDS
PARISH'S OPPOSITION TO
SUMMARY JUDGMENT

18
19 St. Joseph - Otis Orchards and its Parishioners ("St. Joseph - Otis Orchards"), in
20 opposition to the Tort Litigant Committee's (the "Committee") Motion for Summary
21 Judgment (Docket Nos. 63-67, 72), submits the following memorandum of law. This
22 memorandum incorporates and is supported by the Affidavit of the Reverend James
23 Mangan, the Affidavit of James Clift, Parishioner, and Defendants' Omnibus Statement of
24 Facts (LR 7056). St. Joseph - Otis Orchards also adopts and incorporates those Affidavits
25 filed by other Defendants opposing Plaintiff's Motion.
26

ST. JOSEPH - OTIS ORCHARDS PARISH'S OPPOSITION
TO SUMMARY JUDGMENT - 1

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I.

RELIEF REQUESTED

The Committee's attempt to deny St. Joseph - Otis Orchards its ownership interest in real property that St. Joseph - Otis Orchards paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to St. Joseph - Otis Orchards;

2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from St. Joseph - Otis Orchards, a non-debtor; and

3. St. Joseph - Otis Orchards' equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive St. Joseph - Otis Orchards of fundamental property rights and religious freedoms must be denied.

II.

PROCEDURAL HISTORY

A. The Bankruptcy

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including St. Joseph - Otis Orchards. This description is accurate concerning the true ownership of the real property and supported by both facts and applicable law. Neither the Debtor nor St. Joseph - Otis Orchards disputes this particular trust relationship.

1 **B. Appointment of Creditors Committee**

2 On February 2, 2005, the Court entered an Order duly approving the appointment of
3 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who
4 filed complaints against the Diocese in the Superior Court of the County of Spokane, State
5 of Washington. Neither the Committee nor its members have asserted a claim in State
6 Court against St. Joseph - Otis Orchards or identified any legal relationship with St. Joseph
- Otis Orchards.

7 The legal standing of the Committee to seek declaratory relief against non-debtors in
8 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

9
10 **C. The Adversary**

11 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in
12 this adversary proceeding ("Adversary Proceeding"), specifically:

- 13 • FIRST CAUSE OF ACTION
(Declaratory Relief: The Disputed Real Property)
- 14 • SECOND CAUSE OF ACTION
(Declaratory Relief: the Disputed Personal Property)
- 15 • THIRD CAUSE OF ACTION
(Declaratory relief: Substantive Consolidation)
16 (Docket No. 1, Complaint)
17
18

19 Although property is allegedly "disputed," the Committee does not have or assert a
20 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

21 The relief sought by the Committee is drafted as equitable, although it is clearly of
22 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 23 1. Declaring that the Disputed Real Property is property of the estate under 11
U.S.C. § 541(a)(1) as of December 6, 2004;
- 24 2. Declaring that the Disputed Personal Property is property of the estate under
25 11 U.S.C. § 541(a)(1) as of December 6, 2004;
- 26

1 3. Ordering the Debtor to amend its Amended Statement of Financial Affairs and
2 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property
3 and the Disputed Personal Property are all property of the estate;

4 4. Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy
5 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

6 (Adv Complaint, p. 15)

7 By way of the Complaint, the Committee seeks to determine the property rights and
8 interests of not only St. Joseph - Otis Orchards, but of 82 non-debtors. The Complaint
9 seeks to deprive those non-debtors of their instrumentalities used in religious worship,
10 faithful exercise of its mission, activities, and ministries.

11 **D. Motion for Avoidance Powers**

12 On February 7, 2004, the Committee filed a motion in the main case seeking
13 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,
14 2005. The court continued hearing on this matter for an indefinite period (approximately 5
15 to 6 months) with any counsel being able to renote this matter on 20 days notice.
(Main Case Docket No. 393)

16 **E. Motion for Summary Judgment**

17 The Committee filed the present motion for summary judgment ("Motion") on April
18 17, 2005. (Adv. Docket No. 63)

19 The Motion seeks specific relief defining title and ownership of at least 22 separate
20 parcels of real property which belong to at least 22 different and distinct Defendants.
21 Although the Committee's Motion indicates that they have restricted summary judgment to
22 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause
23 of action by way of an "alter ego" argument.

24 The Committee's Motion attempts to "lump" St. Joseph - Otis Orchards' real property
25 with other Defendants' real property interests, dealing with all parcels of property
26 collectively, including all improvements and fixtures. However, each parcel of real property
is a separate parcel of property, with separate and distinct ownership interest, and separate

1 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,
2 and use. The committee's standardized factual scenario is inapplicable and not an
3 appropriate basis for declaratory relief against St. Joseph - Otis Orchards.

4 **F. Motion to Dismiss Adversary Proceeding**

5 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to
6 dismiss this Adversary Proceeding on the following grounds:

7 The Committee's Complaint should be dismissed on either of two (2)
8 separate grounds.

9 1. Nothing contained within the express language of Section
10 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a
creditors committee to file suit against non-debtors to define a non-debtor's
property rights.

11 2. The Bankruptcy Court and Federal District Court lack subject
12 matter jurisdiction over the claims alleged in the Committee's Complaint
13 because there is no case or controversy between the Committee and the
Parishes within the meaning of the Declaratory Judgment Act and Article III of
the U.S. Constitution.

14 (Docket Nos. 99-100)

15 This motion is set to be heard on June 27, 2005.

17 **III.**

18 **NON-CORE PROCEEDING**

19 The Committee asserts in its Complaint that this is a "core proceeding" under 28
20 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief
21 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks
22 declaratory relief against over 80 non-debtor defendants to determine the property rights of
23 separate legal entities. The Complaint does not present a federal question nor is there
diversity between the litigants.

24 The present adversary action has the effect of a defacto quiet title action as to non-
25 debtor defendants. As such, it could have easily been brought in state Superior Court
26 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

1 For purposes of this Adversary Proceeding, St. Joseph - Otis Orchards does not
2 consent to entry of Findings of Fact and Conclusions of Law and does not waive defenses
3 related to Plaintiff's standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

4 IV.

5 STATEMENT OF FACTS

6 St. Joseph - Otis Orchards is a parish comprised of approximately 693 households,
7 or approximately 1,950 individuals. (Aff. J. Mangan, ¶ 5) Under Canon Law, St. Joseph -
8 Otis Orchards is a separate and distinct legal entity known as a juridic person. [Canons
9 §113-115, §515] Under Civil Law, St. Joseph - Otis Orchards is an unincorporated
10 association. (Committee's Statement of Undisputed Fact, No. 23) The property in issue in
11 the Committee's motion is identified by Spokane County Tax Parcel No.s: 55074-1808, and
12 55032.9278. (Aff. J. Mangan ¶ 7) The property at issue belongs to St. Joseph - Otis
Orchards. (Aff. J. Mangan ¶ 7)

13 St. Joseph - Otis Orchards has held, used and maintained land, and made
14 numerous improvements on this land over the years. (Aff. J. Mangan ¶¶ 11, 12; Aff. J. Cliff
15 ¶ 3) The money needed for these improvements was raised by parishioners from
16 parishioners for the sole benefit of St. Joseph - Otis Orchards Parish. (Aff. J. Cliff ¶ 4)
17 Since its establishment, the parish of St. Joseph - Otis Orchards has been comprised of,
18 built, improved and maintained by gifts, donations and tithes of parishioners. (Aff. J.
Mangan ¶¶ 6, 11, 14)

19 St. Joseph - Otis Orchards purchased the property upon which the Rectory sits in
20 1989. (Aff. J. Mangan ¶ 8) All funds for this purchase were the result of donations of
21 Parishioners of St. Joseph - Otis Orchards. (Aff. J. Mangan ¶ 8) In 1991 St. Joseph - Otis
22 Orchards developed its plan for the building of the current Parish building. (Aff. J. Mangan
23 ¶ 9) In 1993 St. Joseph - Otis Orchards sold some of its property to Holy Cross Cemetery.
24 (Aff. J. Mangan ¶ 9) The proceeds from this sale were used by St. Joseph - Otis Orchards
25 for the construction of the new Parish Church. (Aff. J. Mangan ¶ 9; Aff. J. Cliff ¶ 2) In
26 addition to the proceeds from the sale of St. Joseph - Otis Orchards' real property, St.

1 Joseph took out a loan from the Diocese to fund the building of the new Church. (Aff. J.
2 Mangan ¶ 9)

3 In addition to holding a beneficial and equitable ownership interest in the real
4 property in question, St. Joseph - Otis Orchards clearly exists as its own independent
5 entity. Consistent with its ownership of the real property, St. Joseph - Otis Orchards,
6 through its Parishioners, has paid all insurance premiums, completed and paid all fees with
7 tax exempt forms related to the real property, and paid all local assessments. (Aff. J.
8 Mangan ¶¶ 7, 15)

9 The financial strength or weakness of a parish is dependent almost entirely upon its
10 Christian faithful. (Aff. J. Mangan ¶ 6) Offerings, gifts, and tithes are made by Parishioners
11 of the Parish, for the financial well being of the Parish. (Aff. J. Mangan ¶ 6; Aff. J. Cliff ¶¶ 3-
12 4) St. Joseph - Otis Orchards, since its inception, has raised money through weekly
13 collections, tithes, gifts, and capital campaigns. (Aff. J. Mangan ¶ 6)

14 Over the years since its inception St. Joseph - Otis Orchards has engaged in the use
15 of the Diocese's Deposit and Loan Fund Parish Money (which is traceable back to St.
16 Joseph - Otis Orchards bank accounts and further to donations from Parishioners) is
17 placed on deposit in the Fund with the clear expectation of its return to St. Joseph - Otis
18 Orchards for its use. (Aff. J. Mangan ¶ 20) The payments made on loans were made from
19 parishioner donations. (Dec. J. Mangan ¶ 14)

20 In addition to banking with the Diocese Deposit and Loan, St. Joseph - Otis
21 Orchards banks in the public sector. Its accounts are with recognized banking institutions,
22 held in St. Joseph - Otis Orchards' name. (Aff. J. Mangan ¶ 16)

23 St. Joseph - Otis Orchards is truly an independent entity both legally and financially.
24 For example, St. Joseph - Otis Orchards has its own TIN, maintains its own financial
25 records, employs individuals, and hold title to personal property in its name. (Aff. J.
26 Mangan ¶ 16-18)

St. Joseph - Otis Orchards' ownership interest in its property has never been
disputed by the Diocese, nor has St. Joseph - Otis Orchards' separate identity. (Aff. J.
Mangan ¶ 8-10) St. Joseph - Otis Orchards has dealt with the Diocese transferring
interests in property to and from the Diocese. (Aff. J. Mangan ¶ 10) There has never been

1 any confusion that money donated by parishioners was for the benefit of St. Joseph - Otis
2 Orchards and not for the Diocese. (Aff. J. Clift ¶ 3-4) All fund raising and donations
3 received by St. Joseph - Otis Orchards are the result of Parishioner efforts. (Aff. J. Mangan
4 ¶ 6, 14)

5 Contrary to the Committee's conclusions, the facts demonstrate St. Joseph - Otis
6 Orchards is its own legal entity and is the true owner of all equitable and beneficial interest
7 of the real property identified as "St. Joseph - Otis Orchards – Medical Lake" by the
8 Committee.

9 V.

10 STANDARDS OF REVIEW

11 A. Declaratory Judgment Standard.

12 The Committee glosses over the fact that the relief it seeks is entirely declaratory in
13 nature. A declaratory judgment action is ripe for adjudication only where an "actual
14 controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5th Cir. 2000).
15 "As a general rule, an actual controversy exists where 'a substantial controversy of
16 sufficient immediacy and reallty [exists] between parties having adverse legal interests.'"
17 Id., citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5th Cir.
18 1986).

19 Although some Bankruptcy Courts have entertained declaratory judgment actions
20 filed by trustees when the ownership interest of an asset was in dispute which the trustee
21 asserted was property of the estate on the petition date, the present case is not advanced
22 by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11th
23 Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v.
24 Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505
25 (Bankr. S.D. Fla. 1987).

26 There is no legal relationship between St. Joseph - Otis Orchards, the Committee, or
any Committee members. Furthermore, there is no legal dispute between St. Joseph - Otis
Orchards and the Debtor regarding the ownership interests in real property or trust
relationship between the Debtor and St. Joseph - Otis Orchards. It is correctly described
and defined in the Debtor's Statement of Affairs in accordance with the relationship

1 between the parties as established by Canon Law and Civil Law. As such, no actual
2 controversy between parties with adverse legal interests exists.

3
4 **B. Summary Judgment Standard.**

5 The party moving for summary judgment has the burden to show that he is entitled
6 to judgment under established principles; and if he does not discharge that burden, he is
7 not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed.2d 142,
8 90 S. Ct. 1598 (1970).

9 In determining whether there are any genuine issues of material fact, the Court must
10 view the evidence in the light most favorable to the nonmoving party. Summers v. A.
11 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997). The party opposing summary
12 judgment to survive the motion need only present evidence from which a jury might return a
13 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at
14 1039, citing Anderson v. Liberty Lobby, Inc.

15 The Committee has failed to produce any evidence to support its contention that the
16 beneficial and equitable ownership of the real property does not belong to St. Joseph - Otis
17 Orchards.

18 However, St. Joseph - Otis Orchards has not only produced reasonable evidence as
19 to a material issue of fact as to its ownership interest in the real property, it has also
20 produced overwhelming evidence that St. Joseph - Otis Orchards is the true owner of the
21 real property in question.

22
23 **VI.**

24 **LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF**
25 **CONCERNING REAL PROPERTY OWNERSHIP**

26 **A. Whether Applying Civil Law Or Canon Law, St. Joseph - Otis Orchards
Parish Is A Separate And Distinct Legal Entity.**

The Committee has conceded that Parishes are unincorporated associations.
(See, Committee Statement of Undisputed Fact No. 23) The Committee's

1 acknowledgment of St. Joseph - Otis Orchards' status as a separate legal entity
2 from the Debtor is consistent with both Civil and Canon Law.

3
4 **1. Washington Law Recognizes St. Joseph - Otis Orchards As A Legal Entity.**

5 The Parish, as an unincorporated association, is a separate legal entity under
6 Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian
7 faithful ("Parishioners") of each Parish are the residents of their local community. They are
8 residents of cities, towns, and counties within Eastern Washington, in some cases they are
9 members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group
10 pursuing a common purpose. In the case of each parish, the common purpose is the
11 fulfillment of their religious tenets.

12 An "unincorporated association" is defined as "[a] [v]oluntary group of persons,
13 without a charter, formed by mutual consent for the purpose of promoting common
14 enterprise or prosecuting common objective. An organization composed of a body of
15 persons united with a charter for the prosecution of a common enterprise." *Black's Law*
16 *Dictionary*, 1531 (6th 1991). This is a broad definition, and Washington has recognized that
17 "associations vary in their nature." *Riss v. Angel*, 131 Wn.2d 612, 635 (1997).
18 Washington's case law recognizes a variety of forms of unincorporated associations,
19 including groups of individuals of a particular religion or creed. See *Bacon v. Gardner*, 38
20 Wn.2d 299 (1951), *Church of Christ v. Carder*, 105 Wn.2d 204 (1986).

21 Unincorporated associations clearly have the ability to hold the equitable interests of
22 a trust and defend that interest in court. *Leslie v. Midgate Center, Inc.*, 72 Wn.2d 977
23 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated
24 associations to be parties to lawsuits. *Bacon v. Gardner*, 38 Wn.2d 299, 304 (1951); *State*
25 *v. Bothell*, 89 Wn.2d 862, 866 (1978); see also *Church of Christ v. Carder*, 105 Wn.2d 204,
26 206 (1986); *Riss*, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the
capacity to appear and represent their interests in declaratory judgment actions. *RCW §§*
7.24.110 - .130 (West 2005). It is well settled law that unincorporated associations have

1 the ability to represent the interests of their members in legal actions. See, State v. Bothell,
2 89 Wn.2d at 866.

3 It is important to note that not a single case quoted by the Committee in support of
4 its assertion that each Parish is not a legal entity is from the state of Washington.
5 Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

6 The capacity of an individual, other than one acting in a representative
7 capacity, to sue or be sued shall be determined by the law of the individual's
8 domicile. The capacity of a corporation to sue or be sued shall be determined
9 by the law under which it was organized. In all other cases capacity to sue or
10 be sued shall be determined by the law of the state in which the district court
11 is held

12 As a matter of law, unincorporated associations can be sued under Washington law.
13 The various cases cited by the Committee have no precedential value here in Washington.
14 The Committee's argument that St. Joseph - Otis Orchards does not have a legal existence
15 separate from the Diocese fails as a matter of law. It is also inconsistent with Committee's
16 Statement of Undisputed Fact No. 23.

17 **2. St. Joseph - Otis Orchards Is A Separate Legal Entity Under Canon Law.**

18 The Law of the Roman Catholic Church ("Church") has been in existence since the
19 first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the
20 extent the resolution of this matter requires a determination of the relationship between the
21 Debtor and St. Joseph - Otis Orchards in their methods of governance, interaction or
22 management, compulsory deference is required to the provisions of the Code of the Canon
23 Law which govern these religious organizations under applicable law. The Supreme Court,
24 when faced with issues involving the Roman Catholic Church, has stated:

25 In the absence of fraud, collusion or arbitrariness, the decisions of proper
26 church tribunals on matters purely ecclesiastical, although affecting civil
rights, are accepted in litigation before the secular courts as conclusive,
because the parties in interest made them so by contract or otherwise. Under
like circumstances, effect is given in the courts to the determination of the
judiciary bodies established by clubs and civil associations.

Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, ___ S.Ct. ___, 74 L.Ed.131,
137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (___)).

1 This legal principle has been clearly adopted by the Washington State Supreme
2 Court, when addressing real property interests involving a hierarchal church. See,
3 Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of
4 Christ v. Carder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.
5 App. 814 (1982) (All applying the compulsory deference rule established in Watson to
disputes involving church property.)

6 In this case, the identity of the Parish, the Parishioners, the Debtor, and their
7 relationship to their property rights are defined within Canon Law. These relationships, are
8 "purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation
9 before secular courts as conclusive[.]" Gonzalez, 280 U.S. at 16, ___ S.Ct. at ___, 74 L.Ed.
10 at 137.

11 Within the Church, besides physical persons, there are also juridic persons, that is,
12 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon
13 113(2)) A juridic person is an artificial person distinct from all natural persons or material
14 goods. Like a civil law corporation, it is a legal entity which can and must be conceived
15 apart from the natural persons who constitute it, administer it, or for whose benefit it exists.
16 See L. Chiappetta, Il Codice di Diritto Canonico: Commento Giuridico-Pastorale, 2nd ed.
(Rome: Dehoniane, 1996) 1:169; Robert Kennedy, New Commentary on the Code of
17 Canon Law (Paulist Press 2000).

18 Canon Law provides that:

19 A parish is a certain community of the Christian faithful stably constituted in a
20 particular church, whose pastoral care is entrusted to a pastor as its proper
pastor under the authority of a diocesan bishop. (Canon 515(1))

21 Canon 515(3) states:

22 A legitimately erected parish possesses juridic personality by the law itself.
(Canon 515(3))

23 In this case, there is no dispute that St. Joseph - Otis Orchards is a legitimately
24 erected Parish and a juridic person under Canon Law.

25 Canon Law is clear that property acquired by a Parish belongs to the Parish.

Specifically, Canon 1256 states:

Under the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridic person which has acquired them legitimately. (Canon § 1256)

Since its inception, the Christian faithful themselves, which constitute the Parish, have acquired both real and personal property which is used by the Christian faithful in their fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272) The juridic person (Parish) may not be deprived of its property without consent and approval. (See Canons 1281-1288 and 1291-1295)

3. Committee Waived Argument on Individual Parish Standing.

The Committee's decision to name and sue St. Joseph - Otis Orchards and 81 other Parishes individually is evidence of the separate legal identity of each parish. Furthermore, the Committee admits that St. Joseph - Otis Orchards is a separate unincorporated association in its Statement of undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel prevents a party from taking divergent positions in different legal proceedings. Wagner v. Proff Engineers in California Court, 354 F.3d 1036, 1044 (9th Cir. 2004).

In addition, the request for relief in the Complaint seeks substantive consolidation of St. Joseph - Otis Orchards with the Debtor. Substantive consolidation in bankruptcy terms is the consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229 F.3d 750 (9th Cir. 2000)) As such, the Committee has already recognized the legal identity of St. Joseph - Otis Orchards is separate and apart from the Debtor. The Committee should be estopped from taking a contrary position for purposes of its Motion.

4. Judicial Estoppel Does Not Apply to St. Joseph - Otis Orchards.

St. Joseph - Otis Orchards does not dispute the definition of judicial estoppel submitted by the Committee which is designed to prevent a party from taking divergent positions in different legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v. Prof. Engineers in California Gov't, 354 F.3d 1036, 1044 (9th Cir. 2004).

1 However, the Committee fails to present a full recitation of the elements required for a
2 finding of judicial estoppel, and it is in those elements that the Committee's position is
3 revealed to be flawed.

4 The United States Supreme Court recently listed three factors that
5 courts may consider in determining whether to apply the doctrine of judicial
6 estoppel:

7 First, a party's later position must be "clearly inconsistent" with its
8 earlier position. Second, courts regularly inquire whether the party has
9 succeeded in persuading a court to accept that party's earlier position, so that
10 judicial acceptance of an inconsistent position in a later proceeding would
11 create "the perception that either the first or the second court was misled[.]"
12 Absent success in a prior proceeding, a party's later inconsistent position
13 introduces no "risk of inconsistent court determinations," and thus no threat to
14 judicial integrity. A third consideration is whether the party seeking to assert
15 an inconsistent position would derive an unfair advantage or impose an unfair
16 detriment on the opposing party if not estopped. In enumerating these
17 factors, we do not establish inflexible prerequisites or an exhaustive formula
18 for determining the applicability of judicial estoppel. Additional considerations
19 may inform the doctrine's application in specific factual contexts.

20 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9th Cir. 2001), citing New
21 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The
22 application of judicial estoppel is appropriate to bar litigants from making incompatible
23 statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F.3d 597,
24 605 (9th Cir. 1996).

25 The position taken by St. Joseph - Otis Orchards is not inconsistent with the holding
26 of the cases cited by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en*
banc), the case was actually filed by the individual members of St. Patrick's Parishioners
and Friends of Historic Preservation. Of the seven members, six were members of the
Parish. *Id.* at 196. The issue arose when the "St. Patrick Building Committee," a parish
committee, applied for a demolition permit related to St. Patrick School. This was a case of
historic preservation interests vs. parish building committee interests, Parishioner v.
Parishioner. *Id.* at 194-199. The case holding invalidated a statute that was being used by
a non-parishioner in an attempt to stop a building project advanced by a parish building

1 committee for the furtherance of the Church's fundamental right to exercise religion. The
2 ordinance was found to have a coercive effect on the practice of religion.

3 The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.
4 App. 2004), is an unpublished decision. As a matter of law, this opinion should not have
5 been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the
6 Court of Appeals and should not be considered in the trial courts. They do not become a
7 part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668
(1971)(emphasis added).

8 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based
9 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its
10 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in
11 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with
12 the current position taken by the Diocese and the Parishes. There is no assertion or
13 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the
14 Diocese and the Parishes assert that the Diocese holds an ownership interest in the
15 property, but holds that interest in trust for the Parishes. This is not an inconsistent
16 position. Rather, the ownership status of the Bishop in Miller was never addressed or
17 litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's
18 earlier position" because the **nature** of the Bishop's ownership interest was never at issue.
19 Therefore the current position, which is consistent with the prior position, introduces no risk
20 of inconsistent court determinations.

21 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic** 22 **Bishop of Chicago and Oregon Case Law is Misplaced.**

23 First, both Oregon and Illinois apply a neutral principle of law approach to church
24 property issues. When examining church property disputes, Washington applies the more
25 stringent approach of compulsory deference. Furthermore, the legislative histories and
26 governing statutes concerning corporate soles is much different than that of Washington.

F.E.L. Publications was a seventh circuit case which decided the issue on the legal
relationship between the Diocese and the Parishes within it in order to resolve a claim

1 against the diocese for tortious interference with a business relationship. There the Court
2 held that it was impossible for the cause of action to be based on the Diocese's directives
3 to the Parishes as those Parishes had no independent status, and were in fact "subsumed
4 under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied
5 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41
6 Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)
7 and Galich v. Catholic Bishop of Chicago 75 Ill.App.3d 538 (1979). The case primarily
8 relied upon was Galich, however, that issue was not before the court in Galich.

9 In Galich, the Court held that the statute under which the Bishop of Chicago
10 incorporated did not create a statutory trust for the benefit of the Parishioners bringing the
11 case. Further, the Court held that any determination of the ability or inability of the Bishop
12 to demolish a church would violate the First Amendment.

13 The statute under which the case was decided was subsequently amended. As
14 amended, it includes a great deal of language indicating a legislative intent to create a trust
15 for the benefit of the religious congregation for whom the corporation is formed.

16 The other cases relied upon by the F.E.L. Court only support its conclusion by
17 inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip
18 and fall case at a Catholic school. While the issue was not addressed by the Court in
19 Haymes, the implication is that the Catholic school could not have been the proper
20 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged
21 the validity of a local zoning ordinance precluding the creation of a cemetery in the space
22 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic
23 Bishop was the only party which could have brought the action does this case support the
24 conclusion reached by the F.E.L. Court.

25 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real
26 Property At Issue.**

The Committee argues in its Complaint and subsequent Motion that by virtue of its
interpretation of law and facts that St. Joseph - Otis Orchards' real and personal property is
property of the Debtor's bankruptcy estate. However, this argument is not substantiated.

1 Section 541 of the Bankruptcy Code specifically excludes from the estate property to which
2 the Debtor holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. §
3 541(b), (c), and (d))

4 The concept of trust relationships, bare legal title, and beneficial/equitable ownership
5 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor
6 holds mere legal title to property and a non-debtor holds the beneficial or equitable
7 ownership of that property, said property is not property of the estate. See Matter of
8 Torrez, 63 BR 751, 754-55 (9th Cir. BAP 1986)(imposition of resulting trust appropriate
9 since title was only put in children's name to avoid certain restrictions in a government
10 program); Sale of Guar. Corp., 220 BR 660, 664 (9th Cir. BAP 1998)(where the transferee of
11 property does not pay the purchase price for the property, the transferee is presumed to
12 hold the property in a resulting trust for the party who paid the consideration for its
13 purchase).

14 The standard of inquiry under section of the Bankruptcy Code excluding from
15 property of the estate trust interests that are subject to transfer restrictions enforceable
16 under applicable non-bankruptcy law, normally has three parts:

- 17 (1) whether the debtor has a beneficial interest in a trust;
- 18 (2) whether there is a restriction on the transfer of that interest, and
- 19 (3) whether the restriction is enforceable under non-bankruptcy law.

20 In re Wilcox, 233 F.3d 899 (6th Cir. 2000)

21 The evaluation of each element is resolved in accordance with and through the
22 application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d
23 136, 141-42 (1979).

24 Washington law clearly establishes that the Debtor holds only "bare legal title" to the
25 property in question. St. Joseph - Otis Orchards is the true beneficial and equitable
26 ownership of the real property in dispute.

1 **1. St. Joseph - Otis Orchards Parish Is The Beneficiary Of A Statutory**
2 **Trust, Holding All Equitable And Beneficial Interest In The Real**
3 **Property.**

4 The corporation sole statute in Washington clearly and explicitly creates a statutory
5 trust comprised of the disputed property held for the benefit of the Church and its
6 parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

7 The legislative history is absolutely clear that the statute was enacted to create a
8 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was
9 entitled:

10 An Act providing for the organization of corporations sole, defining their
11 powers, authorizing them to transact business and hold property in trust for
12 religious denominations societies or churches.

13 S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,
14 it was referred to the Senate Committee on Corporations other than Municipal. Id. After
15 review by the Committee, recommended that the bill be passed the Senate on March 6,
16 1915.

17 The bill was subsequently passed by the house on March 10, 1915, and was
18 approved by the Governor March 15, 1915.

19 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and
20 Powers of Corporations Sole."

21 Section 3 specifically states:

22 ... Provided, all property held in such official capacity by such bishop,
23 overseer or presiding elder, as the case may be, shall be in trust for the use,
24 purpose, benefit, and behoof of his religious denomination, society or church.

25 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

26 As a corporation sole, the Debtor has the power to contract, sue, and be sued in
court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in
real and personal property in the same manner as any natural person. Id. This grant of
legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The

1 trust is comprised of all the property held by the Debtor in its official capacity RCW §
2 24.12.030 (West 2005). Specifically the statutes state:

3 ...All property held in such official capacity by such bishop, overseer or
4 presiding elder as the case may be, shall be in trust for the use, purpose,
benefit and behoof of his religious denomination, society or church.

5 RCW § 24.12.030 (West 2005).

6 Every corporation sole shall, for the purpose of the trust, have the power to
7 contract in the same manner and to the same extent as a natural person, and
8 may sue and be sued, and may defend in all courts and places, in all matters
and proceedings whatever, and shall have authority to borrow money and
give promissory notes therefor, and to secure the payment of the same by
mortgage or other lien upon property, real and personal; ...

9 RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal
10 relationship between the Debtor, St. Joseph - Otis Orchards, and Parishioners as a
11 relationship of trustee and beneficiary. See, RCW § 24.12.030 (West 2005). This is also
12 consistent with the norms of Canon Law which provide that each parish is a Church
capable of acquiring and owning real and personal property interests.

13 Despite this clear statute and governing principles of Canon Law, the Committee
14 misconstrues Washington case law explicitly recognizing the restrictions existing on
15 property impressed with a trust by dedication to religious organizations for the benefit of
16 such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386
17 (1943), cited by the Committee, the Court explicitly notes that while the alienation of the
18 property in that case was within the power of the trustee, the use of the proceeds from the
19 sale could not be diverted from the benefit of the religious purposes for which the property
20 was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the
21 purpose of respondents was to divert the funds to be received from the sale of the property
22 to other than religious purposes of the Episcopal Church, the court could and would enjoin
23 them. The trustee is merely the holder of the legal title.") Even the court's explicit holding,
24 quoted only in part by the Committee, recognizes that courts will ensure that property of a
25 trust which is held to benefit a religious society cannot lawfully be diverted from the purpose
26 for which the trust is held. Id. at 386. Specifically, the court stated: "For in a trust of the
character involved here, where no restraint is imposed on the right to alienate, the courts

1 will not interfere further than to see to it that the proceeds from the sale of the trust property
2 are not diverted from the use for religious purposes of the faith or denomination to which
3 the property was dedicated.” Id. (emphasis added).

4 Despite the Committee’s assertion that “[t]he corporation sole statute’s ‘trust’ for the
5 Church is no different than the trust in Wilkeson ...” (Committee’s Memo, p. 11) the
6 Committee disregards the court’s explicit statements upholding restrictions on the use of
7 the trust res and its proceeds, and identifying that “[t]he trustee is merely the holder of the
8 legal title.” Id. at 385. The Committee’s memorandum repeatedly fails to distinguish
9 between the rights and obligations of a trustee as the legal title holder of property, and the
10 existence of an equitable interest in the property, attempting instead, to equate the holding
11 of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.
This merely evidences a lack of recognition of the distinction between legal title and an
equitable interest, and does not support the Committee’s argument that no trust exists.

12 The Catholic Bishop of Spokane is the trustee of the statutory trust created under
13 RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the
14 power to alienate certain property of the trust, any such alienation must be for the “benefit
15 and behoof of his religious denomination, society or church.” RCW § 24.12.030 (West
16 2005). With regard to “proceeds from the sale of the trust property,” they “are not to be
17 diverted from the use for religious purposes of the faith or denomination.” Wilkerson, 176
18 Wash. at 386. The statutory trust under which the property is held reserves the beneficial
19 use of the property for St. Joseph - Otis Orchards.

20 **2. St. Joseph - Otis Orchards Is The Beneficiary Of An Express** 21 **Trust.**

22 The recognition and observance of the civil duties of a trustee have been impressed upon
23 the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated as a
24 corporation sole under the foregoing statute on July 3, 1915. With respect to St. Joseph -
25 Otis Orchards Parish, this trust relationship commenced with the formation of the Parish.
26 The Washington Supreme Courts has noted that statements in articles of incorporation can
be sufficient to create an express trust. Hoffman v. Tieton View Methodist Church, 33

1 Wn.2d at 727 (1949) ("There is no question in our minds but that all property acquired by
2 Tieton View was, under article VIII of its articles of incorporation ... held in trust for the uses
3 of the Methodist Church...").

4 The articles of incorporation clearly express the intent of creating and maintaining a
5 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles
6 expressly provide:

7 ARTICLE III

8 This corporation is formed for the purpose of transacting business and
9 **holding property in trust** for that certain religious denomination or society
10 known as the Roman Catholic Church; to do business and contract in the
11 same manner and to the same extent as a natural person; to borrow money
and give promissory notes therefor, and to secure the payment of the same
by mortgage or other lien upon property real and personal, to buy, sell, lease,
mortgage, and in every way use and deal in real and personal property and to
receive bequests for its own use or upon trusts.

12 ARTICLE IV

13 The incorporator of this corporation is Augustine F. Schinner, who is the duly
14 appointed, qualified and acting Roman Catholic Bishop of the Diocese of
15 Spokane, in the state of Washington, and who as such Bishop of the Roman
16 Catholic Church has subscribed these Articles of Incorporation, in order to
17 become a corporation sole, together with his successors in office by his
official designation, in the manner prescribe in "An Act Providing for the
Organization of Corporations Sole, Defining Their Powers, **Authorizing them
to transact business and hold property in trust for religious
denominations, societies or churches.**" passed by the Legislature of the
State of Washington and approved by the Governor, March 15th, 1915.

18 ARTICLE V.

19 This incorporation is a religious corporation, not organized for gain and is
20 without capital stock, **all property held by it being in trust** for the use,
purpose, benefit and behoof of the Roman Catholic Church of the Diocese of
Spokane, in the State of Washington.

21 (Articles of Incorporation, 713115, Emphasis Added)

22 An express trust "arises because of the expressed intent and involves a fiduciary
23 relationship in which the trustee holds property for the benefit of a third party." Goodman v.
24 Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly
25 expressed the intent to hold property in trust for the benefit of the Parishes of the Church of
26 the Diocese of Spokane.

1 A trust will be found to exist if there is a clear manifestation of an intent to create a
2 trust, and the entire instrument, as well as its general purpose and scope, should be
3 considered, and the instrument should be construed in light of the circumstances
4 surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726
(1949).

5 In this case, the trust instrument consists of the deed, which contains explicit
6 language referencing the fact title is held by a "Corporation Sole." The statute governing
7 corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship
8 exists.

9 Just as use and occupancy of property is sufficient to place others on notice of the
10 possessor's interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the
11 failure of a spouse to record an interest in community property does not preclude that
12 spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531
13 (1937)), the use, improvement and maintenance by St. Joseph - Otis Orchards of property
14 recorded in the name of a corporation sole, places the world on notice of the statutory trust
15 under which it is held, and identifies the true nature of the Debtor's interest in the property.
16 Cf. In re Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid
17 statutory trust, and noting that such a finding creates no burden on creditors "[a]s opposed
18 to contractual or implied trusts, the statute is public. There is no secret agreement
19 between" the parties.).

20 **3. Statute Of Frauds Does Not Make The Express Trust In This Case 21 Defective.**

22 Generally, the statute of frauds will prevent parol evidence from enforcing the terms
23 of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App.
24 356, 365 (1994). An exception to the requirement for an express trust over real property is
25 a situation where a beneficiary of the trust has partially performed in accordance with the
26 trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v.
Sanders, 100 Wn.2d 853 (1984).

1 The standard for evaluating partial performance is whether the beneficiary, with the
2 consent of the trustee:

- 3 a. Enters into possession of the land;
- 4 b. Makes improvements to the land; and
- 5 c. Changes position in reliance of the trust.

6 See, Die! at 144-145.

7 As demonstrated in the Statement of Facts in this Memorandum (Section IV), St.
8 Joseph - Otis Orchards and its parishioners have held possession of the property to the
9 exclusion of all others. St. Joseph - Otis Orchards has made all improvements to the land
10 and maintained the structures thereon. All donations have been received with the
11 understanding that St. Joseph - Otis Orchards improved the real property to fulfill religious
12 tenets of the Parish. Such actions were taken with the understanding the Church property
13 was property belonging to St. Joseph - Otis Orchards.

14 **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

15 The Committee's discussion of the administrative dissolution of nonprofit
16 corporations is wholly irrelevant to the enforceability of the restrictions placed on property
17 donated to St. Joseph - Otis Orchards under Washington law. This is not an instance of an
18 administrative dissolution by the state, but a reorganization under Title 11 of the United
19 States Code. Further, St. Joseph - Otis Orchards is subject to the Uniform Management of
20 Institutional Funds Act, RCW Chapter 24.44, which provides only two methods for the
21 release of a restriction placed on donations. RCW § 24.44.060.

22 Under Washington law, donations given with restrictions as to their use, to
23 incorporated or **unincorporated organizations operated for religious**, educational, or
24 other eleemosynary purposes, can only be used in accordance with the restrictions unless
25 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in
26 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)
impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General
be given notice and opportunity to be heard on any such matter before the Superior Court
makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.

1 Id. Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have
2 a long and well established tradition of honoring the intention of the donors and benefactors
3 of religious organizations.

4 The facts of this case demonstrate that the real property at issue was paid for with
5 donated funds, improved, and maintained with donated funds for the benefit of St. Joseph -
6 Otis Orchards.

7 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not**
8 **Exist, A Resulting Trust Should Be Found In Favor Of St. Joseph - Otis**
9 **Orchards.**

10 Even if the statutory and express trusts are found to be ineffective, the acquisition
11 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where
12 property is taken in the name of a grantee other than the person advancing the
13 consideration, the one in whose name title is taken is a resulting trustee for the person who
14 paid the purchase price, in the absence of proof of a contrary intention." Mading v.
15 McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to
16 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74
17 Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).
18 "Similarly, where property is transferred to one person and the purchase price is advanced
19 by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d
20 at 54. Resulting trusts are equitable in nature, and may be established by parole evidence
21 of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at
22 Section IV – Statement of Facts – all acquisitions of real and personal property, all
23 improvements, and all maintenance of the property was paid for with money directly
24 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and
25 intent that it was for the benefit of Parish property. Just as in the case of Matter of Torrez,
26 63 BR 751, 754-755 (9th Cir. BAP 1986), the imposition of a resulting trust is appropriate
since title was placed in the name of the corporation sole with the understanding it was held
in trust for St. Joseph - Otis Orchards. The Bishop never intended to actually own the
property or assert control over the property or improvements as exclusive owner.

1 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**
2 **owed to St. Joseph - Otis Orchards, A Constructive Trust Must Be Imposed.**

3 The facts surrounding the nature of the relationship between the Debtor, St. Joseph
4 - Otis Orchards, and the acquisition of the property establish a constructive trust for the
5 benefit of St. Joseph - Otis Orchards. "A constructive trust is an equitable remedy which
6 arises when the person holding title to property has an equitable duty to convey it to
7 another on the grounds that they would be unjustly enriched if permitted to retain it."
8 Lakewood v. Pierce County, 144 Wn.2d 118, 126 (2001). A constructive trust will be
9 "imposed when there is clear, cogent and convincing evidence of the basis for impressing
10 the trust." Id. To establish a constructive trust, a "party must show the trust arose from the
11 relationship of the parties involved, and that the property justly belongs to that party." Id. at
12 129. Here, the intent of the parties was to create valid statutory and express trusts, the
13 beneficial use of the property was at all times held reserved by and for St. Joseph - Otis
14 Orchards. Not only is there clear, cogent and convincing evidence for the imposition of a
15 trust, but for the Court to hold that the property in dispute belongs to the Debtor would
16 unjustly enrich the Debtor to the detriment of St. Joseph - Otis Orchards who has relied on
17 its ownership of the property since the parish was founded.

16 **F. The Committee's Catch All Argument Of "Alter Ego" Fails As A Matter Of Law**
17 **And Fact.**

18 The "Alter Ego" theory advanced by the Committee is merely a disguised attempt to
19 circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this
20 case, the Committee is asking the Court to rule that St. Joseph - Otis Orchards is liable for
21 the debts of the Debtor, a corporation sole, even though St. Joseph - Otis Orchards is a
22 separate legal entity and is clearly not a "shareholder" of the Debtor.

23 When Washington Courts invoke "piercing the corporate veil", they have applied the
24 "doctrine of corporate disregard" based upon two elements:

25 a. "The corporate form must be intentionally used to violate or evade a duty;"
26 and

1 b. “Disregard must be necessary and required to prevent unjustified loss to the
2 injured party.”

3 See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d
4 689 (1982)

5 The first factor requires a showing of abuse of the corporate form, typically involving
6 fraud, misrepresentation, or other action **by the corporation that harms the creditor and**
7 **benefits the shareholder.** The second factor requires that the harm must actually occur.
8 In this case, the Committee has neither plead nor demonstrated any facts to support both
9 requirements of an “Alter Ego Claim.”

10 The undisputed facts offered by St. Joseph - Otis Orchards demonstrate a claim of
11 “Alter Ego” is without merit. (See Statement of Facts, Section IV)

12 **1. The Committee Attempts To Circumvent Statutory Prohibitions Against**
13 **Substantive Consolidation Of A Not “Moneyed” Entity.**

14 The Committee's Complaint, in its third cause of action, seeks a declaratory order for
15 substantive consolidation “all Diocese Related Entities.” The Committee's Motion for
16 Summary Judgment now seeks a declaratory order under a theory of “Alter Ego.” Such a
17 legal theory is nothing more than a thinly veiled attempt to place St. Joseph - Otis Orchards
18 and other non-debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief
19 which is forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative
20 history. House Report No. 95-595, 95th Cong., 1st Sess 321 (1977).

21 The Bankruptcy Code clearly recognizes that not all debtors are the same. And
22 while Chapter 11 and its provisions do not generally distinguish between for-profit, non-
23 profit, and religious organizations for the purposes of reorganization, that is not to say that
24 a distinction does not exist and should not or cannot be made. For example, under the
25 Bankruptcy Code non-profit corporations are treated more favorably than for-profit
26 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from
involuntary bankruptcy), 11 U.S.C. § 1112(c) (forbidding a court from converting a case
filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has
recognized that religious organizations present unique bankruptcy issues because

1 government regulation of religion implicates First Amendment rights. For example, the
2 Bankruptcy Code has been modified by Congress to protect free exercise of religion to
3 prevent a trustee from avoiding a debtor's donation given to a religious or charitable
4 organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.
5 L. No. 105-183, 112 Stat. 517 (1998).

6 Substantive consolidation has no express statutory basis, but rather, is a "product of
7 judicial gloss." In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2nd Cir. 1988).
8 Substantive consolidation results in pooling the assets of, and claims against, the two
9 entities, satisfying liabilities from the resultant common fund; eliminating inter company
10 claims; and combining creditors of the two companies for purposes of voting on
11 reorganization plans. In re Bonham, 229 F.3d 750, 764 (9th Cir. 2000).

12 In the present case, even if the Committee could get around the statutory
13 prohibitions, the Committee would have to demonstrate 1) that the Committee or its
14 members dealt with St. Joseph - Otis Orchards Parish and the Debtor as a single economic
15 unit and did not rely on the separate credit of each of the entities; or that the operations of
16 the Debtor and St. Joseph - Otis Orchards Parish were **excessively** entangled with the
17 Debtor's affairs to the extent that consolidation will benefit all creditors. See In re Bonham,
18 229 F.3d 750, 766 (9th Cir.).

19 The newly surfaced "Alter Ego" theory is nothing more than a recognition that
20 Committee's third cause of action has no application in this case.

21 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**
22 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**
23 **Act.**

24 The exercise of religion includes the "right to believe and profess whatever religious
25 doctrine one desires" and prevents the government from "lendi[ng] its power to one side or
26 another in controversies over religious authority or dogma." See Smith, 494 U.S. at 877
(citations omitted). To protect the exercise of religion, the Supreme Court has held that if
the government "substantially burdens" a person's exercise of religion, and the government
does not demonstrate that it has a "compelling government interest" to justify the religious

1 burden, then the government intrusion into a person's free exercise of religion has been
2 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later
3 limited Sherbert by holding that "the right of free exercise does not relieve an individual of
4 the obligation to comply with a 'valid and neutral law of general applicability . . .'" See
5 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was
6 immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42
7 U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), "to restore the compelling interest test as set
8 forth in Sherbert," and "to guarantee its application in all cases where free exercise of
9 religion is substantially burdened," including cases in which the law at issue was of "general
10 applicability." See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507
11 (1997), the Supreme Court declared RFRA unconstitutional as applied to state actions
12 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth
13 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA "intruded into an
14 area reserved by the Constitution to the States"). However, RFRA continues to be
15 constitutional as applied to federal law.

16 Under RFRA, a neutral law of general applicability is an unconstitutional
17 infringement of a person's free exercise rights if the following is true: (1) the law
18 substantially burdens a person's exercise of religion; (2) the government cannot justify the
19 law with a compelling government interest; and (3) there are no less restrictive means of
20 furthering the government's compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

21 Two unique circumstances arise would occur if the Court were to dictate the
22 ownership and use of Parish property: (1) a religious leader will have been replaced by a
23 government official as the head of a religious organization, resulting in comprehensive
24 government surveillance of religion; and (2) a government official will be in an
25 unprecedented position of decision making power over a church/Parish, a position
26 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in
the appearance of government endorsement of religion for the benefit of a creditor's
committee.

St. Joseph - Otis Orchards' economic interests cannot be separated from its spiritual
interest – any economic decision the Court makes regarding use or ownership of property

1 inevitably has direct and significant religious consequences. Thus, the Court will become
2 hopelessly entangled with religious policy of the Catholic Church. The effect of St. Joseph -
3 Otis Orchards' spiritual mission is that every financial decision it makes is driven by
4 religious objectives toward religious ends in accordance with Canon Law. This creates an
5 irreconcilable church versus state conflict between a non-debtor, a creditors committee,
6 and the Court. By effectively forcing a Parish into bankruptcy by way of declaratory relief,
7 the government is changing the essential structure of St. Joseph - Otis Orchards under
8 Canon Law. Since the Canon directs the religious vision and thus the financial objectives of
9 St. Joseph - Otis Orchards, such a change would essentially allow government to
10 determine who benefits from St. Joseph - Otis Orchards' mission.

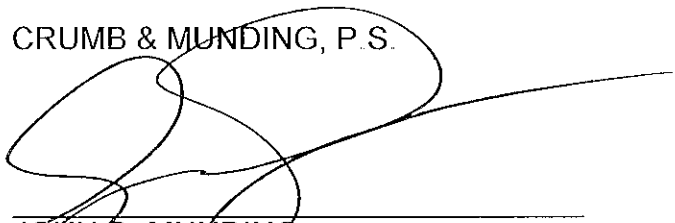
11 VII.

12 CONCLUSION

13 As a matter of law, the Committee has not established a case in controversy with St.
14 Joseph - Otis Orchards that would permit the declaratory relief requested. Even if the Court
15 were to consider the pending motion for summary judgment based upon the Committee's
16 factual theory, the Committee's motion fails as the Committee has failed to eliminate
17 material questions of fact as to St. Joseph - Otis Orchards' ownership interest in the real
18 property, including furnishing all consideration for purchase, improvements, and
19 maintenance.


20 DATED this 26th day of May, 2005.

21 CRUMB & MUNDING, P.S.

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23 _____
24 JOHN D. MUNDING
25 WSBA #21734
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ELSAESSER JARZABEK ANDERSON
MARKS ELLIOTT & MCHUGH



FORD ELSAESSER
BARRY MCHUGH

Attorneys for Defendant Parishes

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